

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Murray P. J., and Sawyer and Smolenski, J.J.

BRUCE B. FEYZ,

Plaintiff-Appellee,

Supreme Court No. 128059

v

MERCY MEMORIAL HOSPITAL, RICHARD
HILTZ, JAMES MILLER, D.O., JOHN
KALENKIEWICZ, M.D., J. MARSHALL
NEWBERN, D.O., AND SONGCO, M.D.,

Court of Appeals No. 246259

Monroe County Circuit Court
LC No. 02-014174-CZ

Defendant-Appellants,

and

MEDICAL STAFF OF MERCY MEMORIAL
HOSPITAL,

Defendant-Appellant.

**AMICI CURIAE BRIEF OF THE MICHIGAN CIVIL RIGHTS COMMISSION
AND THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS**

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Dated: April 26, 2006

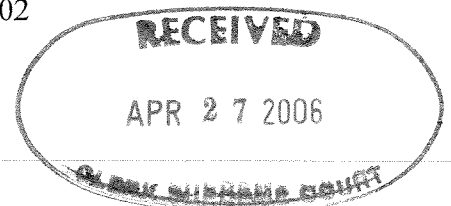


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QUESTIONS PRESENTED FOR REVIEW

- I. Const 1963, art 5, § 29 confers plenary power upon the Michigan Civil Rights Commission in the area of civil rights enforcement. As a constitutional commission, the Commission's authority can only be limited by the State Constitution and the Constitution of the United States. May the State Legislature enact a law that would restrict the Commission in the exercise of its State constitutional powers?**
- II. Michigan's peer review statute provides for the nonreviewability of certain hospital decisions. That principle does not, however, permit hospital authorities to act contrary to State and federal law. Is a decision by a hospital that violates an individual's civil rights contrary to State and federal law subject to judicial review?**
- III. Michigan has a long history of advocating civil rights protection on behalf of its citizens. It is the only State in the country that has a constitutionally created Civil Rights Commission authorized to investigate and secure the enjoyment of civil rights without discrimination. Would it be a patent violation of public policy to grant private hospitals carte blanche to violate State civil rights law?**

STATEMENT OF PROCEEDINGS AND FACTS

Amici Curiae adopts by reference the Statement of Proceedings and Facts of Plaintiff-Appellee.

STATEMENT OF INTEREST

The purpose of the Michigan Civil Rights Act is to prevent discrimination directed against a person because of their membership in a certain class, and to eliminate the effects of demeaning prejudices and biases.¹ The Act is remedial and must be liberally construed to effectuate its ends.²

The Michigan Civil Rights Commission was created under the Michigan Constitution of 1963 for the purpose of protecting individuals from discriminatory treatment by government, private citizens or organizations.³ The Michigan Department of Civil Rights was established to act as the "investigative arm" of the Commission, and is responsible for investigating discrimination claims. The Commission and the Department are responsible for enforcing the Civil Rights Act.⁴ Because of their broad constitutional and statutory authority, they are in a unique position to provide this Court with an interpretation of State civil rights law. The Commission and the Department believe that the ruling of the Court of Appeals, holding that the peer review statute does not grant absolute immunity to hospitals that violate State civil rights

¹ *Noecker v Dept of Corrections*, 203 Mich App 43, 46; 512 HW2d 44 (1993).

² *Miller v C A Muer Corp*, 420 Mich 355, 362-63; 362 NW2d 650 (1984); *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 15; 506 NW2d 231 (1993).

³ Const 1963, art 5, § 29.

⁴ See MCL §16.575.

law is consistent with both the Michigan Constitution and applicable case law. Therefore, the Commission and the Department request to appear as *amicus curiae* in this matter.

ARGUMENT

- I. **Const 1963, art 5, § 29**^{Error! Bookmark not defined.} **confers plenary power upon the Michigan Civil Rights Commission in the area of civil rights enforcement. As a constitutional commission, the Commission's authority can only be limited by the Michigan Constitution and the Constitution of the United States. The State Legislature may not enact a law that would restrict the Commission in the exercise of its State constitutional powers.**

A. **Standard of Review**

Amici Curiae adopts by reference the Standard of Review of Plaintiff-Appellee.

B. **Summary of Argument**

The Michigan Civil Rights Commission and the Michigan Department of Civil Rights (MCRC/MDCR) submit this brief as amici curiae in support of Plaintiff-Appellee's Brief on Appeal.

Plaintiff-Appellee Bruce Feyz is a physician at Defendant Mercy Memorial Hospital. The instant action arose as a result of a dispute between Plaintiff and the hospital administration regarding a series of standing orders he (Plaintiff) wanted nursing staff to implement as part of the patient admissions process. The hospital administration reacted unfavorably to these changes and, ultimately, placed Plaintiff on indefinite probation. Additionally, Plaintiff was referred for a psychological examination. The examination failed to disclose a diagnosis of mental illness and, thereafter, Plaintiff instituted the instant action, claiming, among other things, that Defendant Hospital violated his State civil rights under the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq.*

Defendant Hospital argued that Plaintiff's claims arose out of the actions of the peer review committee and, as such, were immune from suit under the peer review statute⁵. The Court of Appeals disagreed. The Court's determination was based on two reasons. First, that the

⁵ MCL 331.531 *et seq*

peer review statute only grants immunity for an act or communication within the scope of peer review committee's authority as a "review entity," and that such authority does not extend to a violation of an individual's civil rights. Second, that a violation of a civil rights act is a malicious act which, by definition, is outside the scope of immunity granted by the peer review statute. In essence, the Court of Appeals ruled the immunity provision of the peer review statute was never intended to grant Defendant hospitals "safe harbor" from suit for violation of a person's civil rights guaranteed by State and federal law.

This brief will address the narrow legal issue of whether the peer review statute grants peer review committees immunity from violations of State civil rights law. The MCRC/MDCR believe that it does not, and that the Court of Appeals ruling on this matter was correct for the following reasons: (1) Under the authority of the Michigan Constitution and applicable case law, the State legislature cannot enact a law which would, in effect, limit the Michigan Civil Rights Commission from carrying out its constitutional mandate to investigate and enforce State civil rights law; (2) Under its plain statutory language, the peer review statute did not grant absolute immunity to hospitals for violations of State civil rights law; and (3) Public Policy dictates that there be a "check" upon a hospital's unfettered discretion to make staffing decisions that violates State and federal law.

Const 1963, art 5, § 29 establishes the State Civil Rights Commission and defines its sphere of authority as follows:

There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall expire in the same year. *It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed*

by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. The legislature shall provide an annual appropriation for the effective operation of the commission.

The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. *The commission shall have other powers provided by law to carry out its purposes.* Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law. [Emphasis added]

It is clear from the plain reading of Const 1963, art 5, § 29, that the people have conferred plenary power upon the Civil Rights Commission, as a constitutional commission, to investigate and to secure the enjoyment of civil rights without discrimination.⁶ By implication, the grant of power in the Constitution carries with it the authority to do all things necessary to accomplish the purpose intended by the people⁷:

Thus the Civil Rights Commission created by the people in the Constitution is not limited to the powers expressly granted, and the Commission may exercise all powers necessary and essential in the performance of its duties.

This broad extent and plenary nature of the Civil Rights Commission's authority was acknowledged by this Court in *Civil Rights Commission v Clark*⁸. In *Clark*, this Court held that

⁶ *Plec v Liquor Control Commission*, 322 Mich 691; 34 NW2d 524 (1948).

⁷ OAG 1963-1964, No 4161, p 144 (July 22, 1963).

⁸ *Civil Rights Commission v Clark*, 390 Mich 717; 212 NW2d 912 (1973).

the Legislature could expand the authority of the Civil Rights Commission, but that such authority as derived from the Constitution could not be so limited⁹:

A balanced construction of § 29 requires recognition of limitations on the power of the Legislature to restrict the powers of the CRC. The CRC, just as the Legislature, Governor and this Court, derives its power directly from the people under the Constitution.

The Legislature, although it may legislate with regard to the exercise of executive and judicial functions, may not prevent the executive or judicial branches from exercising their powers. Similarly, the Legislature, although it may legislate with regard to the CRC, may not do so in a manner which prevents the CRC from functioning effectively.

In the instant case, Defendant hospital argues that the peer review statute grants it absolute immunity from suit under State civil rights law. In effect, Defendant hospital is arguing that the Legislature has the authority to limit the plenary power of the CRC, as conferred by the Michigan Constitution, to investigate and to secure the enjoyment of civil rights without discrimination. Such an argument would clearly circumvent the constitutional authority of the CRC and is therefore contrary to law. This is because Constitutional provisions are superior to statutory provisions.¹⁰ It would also be contrary to established constitutional principles of separation of powers and this Court's ruling in *Clark, supra*. Michigan's peer review statute provides for the nonreviewability of certain hospital decisions. That principle does not, however, permit hospital authorities to act contrary to State and federal law. A decision by a hospital that violates an individual's civil rights is contrary to State and federal law and, therefore, is subject to judicial review.

⁹ *Clark*, 390 Mich 717, 726 (Footnote omitted)(Emphasis added).

¹⁰ 1 Sands, Sutherland Statutory Construction (4th ed), § 2.01, p 13; *Holmes v State Officers Compensation Comm'n*, 57 Mich App 255, 262; 226 NW2d 90 (1974).

Private hospitals do not enjoy absolute immunity from judicial review when making staffing decisions. A plain reading of the peer review statute reveals that this nonreviewability standard is not absolute.

MCL 331.531, provides in pertinent part:

(1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.

(2) As used in this section, "review entity" means 1 of the following:

(a) A duly appointed peer review committee of 1 of the following:

* * *

(iii) A health facility or agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.

* * *

(3) A person, organization, or entity is not civilly or criminally liable:

(a) For providing information or data pursuant to subsection (1).

(b) For an act or communication within its scope as a review entity.

(c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

(4) *The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.*
[Emphasis added]

While adhering to the notion that some hospital staffing decisions are not reviewable by the court, several panels of the Court of Appeals have recognized that that this principle is not

without limitations. For example, in *Sarin v Samaritan Health*, the Court refused to intervene in the peer review process in that case. The court stopped short of saying that such a review would never be appropriate.¹¹ The *Sarin* Court concluded that "[w]hile there may be some situations where a court should be able to consider a hospital's action without violating the principle of non-reviewability, this case is not that sort."¹² Similarly in *Long v Chelsea*, the Court of Appeals recognized that the nonreviewability principle was not carved in stone, particularly where a hospital's staffing decision violates state and federal law, concluding that¹³:

[w]e decline to articulate a broad principle that a private hospital's staffing decision may *never* be judicially reviewed. Indeed, in doing so, we reiterate the proposition from *Sarin* that, under some circumstances, a court may consider a hospital's decisions without violating the nonreviewability principle. (cite omitted) *Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim.* In this case, however, plaintiff did not assert a violation of civil rights or a violation of a state statute. The same is true in some of the cited cases.

In the instant case, the Court of Appeals correctly applied the decision in *Long* to the facts in this case to find that Plaintiff Feyz's civil rights claim was reviewable by the court.

II. Michigan has a long history of advocating civil rights protection on behalf of its citizens. It is the only State in the country that has a constitutionally created Civil Rights Commission authorized to investigate and secure the enjoyment of civil rights without discrimination. It would be a patent violation of public policy to grant private hospitals carte blanche to violate state civil rights law.

Public policy requires that there be a "check" on the ability of hospital authorities to make staffing decisions, particularly where those decisions are in direct violation of State and federal civil rights law. The peer review statute was never intended to provide hospitals with

¹¹ *Sarin v Samaritan Health Center*, 176 Mich App 790; 440 NW2d 80 (1989).

¹² *Saren*, 176 Mich App at 795.

¹³ *Long v Chelsea*, 219 Mich App 578, 586-587; 557 NW2d 157 (1996) (Emphasis Added).

unfettered discretion to make staffing decisions that are contrary to this state's long history of advocating civil rights protection on behalf of its citizens. As in the instant case, if hospitals are allowed to shield themselves from discriminatory actions based upon disability or perceived disability, then there is little to stop them from making staffing decisions based on other protected categories. In effect, hospitals would be free to make staffing decisions based upon religion, race, color, national origin, age, gender, familial status, or marital status, etc. Such a result would constitute a patent violation of public policy.

CONCLUSION

Const 1963, art 5, § 29, confers plenary power upon the Civil Rights Commission, as a constitutional commission, to investigate and to secure the enjoyment of civil rights without discrimination. Constitutional principles of separation of powers and this Court ruling in *Clark, supra*, indicate that while the Legislature may expand the powers of a constitutional entity, such as the Commission, it cannot limit those powers. Nor can the Legislature enact laws to nullify the constitutional authority of the Civil Rights Commission. To hold that the peer review statute grants a hospital immunity from civil rights claims would be to nullify the Commission's authority under the Michigan Constitution to enforce civil rights law. Additionally, a plain reading of the peer review statute reveals that this nonreviewability standard is not absolute. Several panels of the Court of Appeals have correctly ruled that while the nonreviewability principle may be applicable in some situations, it was not intended to grant private hospitals carte blanche to violate the public policy of our State as contained in its laws. Thus, hospital staffing decisions that violate State civil rights laws must be reviewable by the court. Lastly, public policy demands that there be a "check" on the ability of hospital authorities to make staffing decisions, particularly where those decisions are in direct violation of State and federal law. To hold otherwise would be to give hospitals unfettered discretion to make staffing decisions based upon any protected category, including religion, race, color, national origin, age, gender, familial status, or marital status, etc. Such a result would be a patent violation of public policy.

RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, the Michigan Civil Rights Commission and the Michigan Department of Civil Rights respectfully request that this Honorable Court affirm the decision of the Court of Appeals.

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Date: April 26, 2006